

manitoba
advisory council
On the status
Of women

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SEXUAL ASSAULT: MANITOBA CONCERNS

TO: The Hon. R. Penner, Attorney General, Manitoba
FROM: Roberta Ellis-Grunfeld, Chairperson
Manitoba Advisory Council on the Status of Women

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There is no question that the passage of Bill C-127 marked a distinct change in the legislation which deals with sexual assault charges. The concept that sexual assault is a crime of violence has been codified in the law, and we would tend to agree with the April '84 Report presented to The Alberta Law Foundation in conjunction with the Calgary Sexual Assault Centre that:

"The new sexual assault legislation hoped to increase reporting and humaneness within the court process."

Over the past two years, three Manitoba cases have been brought to the attention of the Advisory Council by concerned Manitobans.

They are: R v Sansregret
 R v Guiboche
 R v Pagee

It is understood that R v Sansregret is being appealed to the Supreme Court and that R v Guiboche was appealed to the Manitoba Court of Appeal. In the case of the latter, I believe the verdict was upheld and the sentence extended from six months to one year. In any case, Council fully appreciates you are unable to make specific comment on cases which are still pending.

Nevertheless, it is timely to alert the Attorney General and the Government of Manitoba to the concern that women continue to suffer unjustly notwithstanding the intent of actual changes within the new sexual assault legislation. The Calgary project previously mentioned notes:

"The intent of law is subject to interpretation in particular, by the judiciary and inter-related systems. The greatest concern over the use of law is that outdated and incorrect societal attitudes/beliefs surrounding sexual assault will continue to influence the perception of the individual judiciary and subsequently be reflected in sentencing."

This case is proceeding to the Supreme Court and I appreciate you are not in a position to respond. I draw your attention to it, however, as the outcome must certainly signal to Manitoba women whether or not the current sexual assault legislation is treating them justly. In this particular case, despite the Judge's acknowledgement that the complainant submitted to the accused's demands in terror, and fear of her life,

"There was no consent. There was submission as a result of a very real and justifiable fear. No one in his right mind could have believed that the complainant's dramatic about face stemmed from anything other than fear. Nevertheless, the accused was convicted of break and enter with intent, and unlawful confinement, but was not convicted of sexual assault."

A nadir of injustice is reached, surely, when a woman is stripped and bound, threatened with a knife, her property is attacked with a knife, and the assailant threatens to dismember her cat - as a result she submits to sexual acts - and the outcome is that her attacker is not convicted of sexual assault because the victim's terrified submission is presented as evidence of consent which the attacker "mistakenly, but honestly" believes.

Ms. Krindle, the judge in this case, noted that the facts in R v Sansregret are quite dissimilar to the facts in the case of R v Pappajohn, but that the ruling of the Supreme Court in the latter case is very broad and does not limit itself to that

particular case. Obviously, Judge Krindle's concern is certainly reflected in her expressed desire that the Crown appeal. The split Court of Appeal decision (Huband and Matas deciding for the complainant and a conviction of sexual assault; Philp dissenting) indicates that much has to change in addition to the law before the spirit of the legislative changes is understood and applied by all members of the judiciary.

R v Guiboche - August 9, 1983 Manwaring, F.M.

This decision is important, being the first Manitoba ruling under section 246.8, concerning the sexual assault of a spouse. The judge in this case indicates that the victim was "brutally assaulted" and does make it quite clear that the assailant had no right to sexually assault her because she was his wife. Perhaps it should be noted that the assailant:

"pursued and caught her and began punching her in the face. He threw her to the ground and began choking her...then dragged his wife along the ground a short distance, pulled her pants to her knees and had intercourse with her against her will...Medical evidence presented at the trial noted (the survivor)...required eight stitches to close cuts to her nose and mouth."

Wpg. Free Press, Sept. 8, 1983.

The sentence in this case was 6 months with a year's probation.
(n.b. the charge was level III.)

I think it is interesting to include for comparison, the first spousal case in Canada, heard in Grande Prairie, Alberta in March, 1983 (Judge Stapeles, presiding). The incident involved caused bodily harm and the assailant was charged under level II. Sentence was one year in jail and one year probation.

Judge Staples notes:

"I am of the view, and I believe it is common ground, that the degree of trauma associated with a sexual attack is affected by the relationship, if any, between

the parties. And I think it cannot be said that the trauma suffered by the victim is as great where there has been a past history of lawful sexual relations with the accused as it would be if she were attacked by a stranger."

This is a widespread, and we fear, dangerous conclusion. Those who counsel survivors agree that trauma is often greater when the assailant is known to the survivor. Basic trust has been violated and the relationship damaged. Data also indicates that a high percentage of survivors know their assailant and often have a trust of love relationship prior to the assault.

"Victims making reports included women of all ages who came from all areas of the city. 74% of all assailants were known to the victim, and of these, one half used physical force or weapons in the assault. The majority of all the assaults reported occurred in the home of the assailant and/or victim or in another residence."

Klinic (Data for 1983) April, 1984.

R v Pagee - April 27, 1984 Barkman, G.

In this case the complainant contended she did not consent to intercourse with her attacker and was a victim of sexual assault. The defendant presented a defence of belief in her consent. The initial judgement given by Mr. Barkman found,

"that the evidence of the complainant should be accepted as being more credible than the evidence of the accused."

The evidence for this judgement included the facts that the complainant's clothing was torn, her vagina injured, (2 days later the examining doctor also noted bruising to her arm and breast) and that she was upset and distraught when she hailed the first car which passed her after the accused ran off.

The accused was convicted and sentenced to six months.

This conviction was overturned by the Court of Appeal on October 31, 1984, Monnin, C.J.M., O'Sullivan, J.A., Philp, J.A. presiding (A unanimous decision)

It appears then that the Court of Appeal chose to believe that a young woman walking home at 2:30 a.m. encounters a stranger and within fifteen minutes is engaging in consensual sexual intercourse on a public sidewalk. No weight is given at all to her ripped clothing, injuries, or distraught behaviour on hailing a passing car.

An additional fact is disturbing in this case. Whilst on bail for his offense, Mr. Pagee was arrested on another sexual assault involving a 16 year old girl and has been committed to stand trial. I understand that this was not a matter which could properly be laid before the Court of Appeal. I also understand that owing to the unanimity of the Court of Appeal's decision to reverse Mr. Barkman's original conviction of the defendant, and owing to the absence of a factor of legal controversy of national importance, this case will not be appealed to the Supreme Court.

It is extremely difficult to accept the Court of Appeal's decision, though unanimous, as just. Legitimate anger must be expressed regarding the extent of the powers of judicial discretion which can disregard the evidence of torn clothing, physical injury and emotional trauma in support of the view of the defendant that the complainant consented. This decision supports the assertion of women's organizations across the country that 'judicial discretion' can be contaminated by the myths and stereotypes surrounding women who have been sexually assaulted. Neither, it must be admitted, are all of the powers of judicial discretion edified by an awareness of the understandable behaviour of a woman who fears for her safety or life and consequently submits to sexual assault.

Obviously, the current sexual assault legislation has not been operational for long - two years not being particularly lengthy in the context of the process and procedures of the law.

However, I believe there must be sufficient cases in Manitoba to warrant a survey to determine how the law is being administered in the province. If this is a project which is not already being undertaken, we would urge that you initiate it. It could include:

- 1) Judicial discretion
- 2) Spousal charges
- 3) Past sexual history
- 4) Sentencing as a deterrent and statement of the seriousness of the offense
- 5) The effect of the Pappajohn decision, which in effect licenses sexual assault.

The Manitoba Advisory Council on the Status of Women would be happy to assist in identifying community resource people to undertake such a project and looks forward to discussing this further.

A component of the Calgary project which we found interesting and would be very worthwhile pursuing is a recommendation regarding the need for education throughout the judicial process. This would be aimed at providing a clear understanding of the dynamics of sexual assault and the range and extent of psychological or emotional trauma to the survivor. This education process could help reduce the continued expression of individual beliefs or myths which incorporate into the interpretation of the law. It seems to us, for example, that the whole concept of mens rea is crucial in the interpretation of evidence and consequently the application of the law.

Mens rea depends on the offender having a clarity of mind concerning the offense. But consider: society has raised men to believe they have a right of access to women. This has been evident in legislation (for example the denial of spousal rape as an illegal act) in pornography, in sex-role stereotyping, and in the myth that women like or want to be raped and that "no" really means "yes". Feminists advance the argument that the mens rea of the accused in cases of sexual assault is in automatic conflict with the right of the victim to say no. Mens rea can have no validity in cases of sexual assault yet in far too many cases, the defence that the assailant honestly, albeit it is even conceded, mistakenly believes in the victim's consent, is accepted and the assailant is acquitted. The Pappajohn case pushed this insanity to the limit with the conclusion that the belief that the victim consents does not even have to be reasonable.

Surely there must be a concession that this matter demands an educational airing among those members of the judicial process responsible for these weighty decisions.